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9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF NEVADA**

11 * * *

12 Marina District Development Company,
13 LLC,

14 Plaintiff,

15 v.

16 AC Ocean Walk, LLC, et al.,

17 Defendants.
18

Case No. 2:20-cv-01592-GMN-BNW

ORDER

19 This matter is before the court on Plaintiff's emergency motion for sanctions (ECF Nos.
20 48 and 49). Plaintiff seeks sanctions for defense counsel contacting Plaintiff's employee, Mr.
21 Lyons, without counsel's consent, allegedly in violation of Rule 4.2 of the Nevada Rules of
22 Professional Conduct. *See id.* Defendants opposed the motion. ECF No. 57. The Court did not
23 permit a reply (ECF No. 50) and held a hearing on September 21, 2020, to expedite resolution of
24 the motion. ECF No. 64. After the hearing, the Court took the motions under submission and
25 ordered supplemental briefing on one issue. *Id.*; ECF No. 66. Specifically, the Court ordered
26 supplemental briefing on "what provision of state law [Plaintiff] believes vests Mr. Lyons with
27 the ability to bind plaintiff in a legal evidentiary sense." ECF No. 66. Plaintiff and Defendants
28 filed supplemental briefs at ECF Nos. 71, 73.

1 Defendants then moved to strike portions of Plaintiff's supplemental brief and
2 accompanying exhibits. ECF No. 72.

3 As discussed below, the Court will deny Plaintiff's motions (ECF Nos. 48, 49) and deny
4 Defendants' motion (ECF No. 72) as moot.

5 **I. Background**

6 **A. Plaintiff's Complaint and Motion for Preliminary Injunction**

7 This is a case about two competing casinos. *See* ECF No. 1. Plaintiff, Marina District
8 Development Company, LLC d/b/a Borgata Hotel Casino & Spa (Borgata), alleges that
9 Defendant AC Ocean Walk, LLC d/b/a Ocean Casino Resort (Ocean) is "in the process of raiding
10 Borgata's casino marketing department" and unfairly competing against Borgata. *Id.* at 2. Borgata
11 alleges that Ocean hired five of Borgata's executives, including Borgata's Executive Director of
12 Marketing (Kelly Burke) and Vice President of Relationship Marketing (William Callahan). *Id.*
13 Borgata further alleges that these employees have a duty to protect Borgata's trade secrets. *Id.*
14 However, Ms. Burke's and Mr. Callahan's employment at Ocean will allegedly require them to
15 use their knowledge of Borgata's trade secrets and other confidential information to perform their
16 new jobs. *See id.* Borgata argues that Ocean intends to misappropriate Borgata's proprietary
17 information and cripple Borgata's casino operations. *Id.* at 2-3.

18 Borgata also makes specific allegations in its complaint regarding Mr. Callahan's
19 Borgata-issued cell phone. Specifically, Borgata alleges that it issued Mr. Callahan a cell phone
20 that contains trade secrets and other confidential information, which he now refuses to return. *Id.*
21 at 3, 6.

22 Based on this conduct, Borgata sued Ocean, Mr. Callahan, and Ms. Burke. ECF No. 1.
23 Borgata seeks injunctive relief, a declaratory judgment, and monetary damages for breach of
24 contract, tortious interference, unfair competition, and violations of the Defend Trade Secrets Act,
25 New Jersey Trade Secrets Act, and Racketeer Influenced and Corrupt Organizations Act (RICO).
26 *Id.*

27 Shortly after filing its complaint, Borgata filed a motion for a preliminary injunction. ECF
28 No. 9. Borgata sought several forms of temporary injunctive relief, including that Mr. Callahan

1 return his Borgata-issued cell phone. ECF No. 9-8. Defendants opposed Borgata's motion for a
2 preliminary injunction. ECF No. 40. Critically, in support of their opposition, Defendants
3 attached a declaration stating that Borgata's president said that Mr. Callahan could keep his
4 phone. ECF No. 40-2. The declaration was signed by a Borgata employee. *See id.* at 2. More
5 specifically, it was signed by Borgata's Vice President of Relationship Marketing, Mr. Lyons. *Id.*
6 at 2.

7 **B. Borgata's Emergency Motion**

8 Borgata alleges that Defendants violated the Nevada Rules of Professional Conduct by
9 obtaining Mr. Lyons's declaration. ECF Nos. 48, 49.¹ Specifically, Borgata alleges that defense
10 counsel violated Rule 4.2, which generally provides that a lawyer may not communicate with
11 another represented party about the subject of the representation, unless authorized to do so by the
12 other lawyer, law, or court order. Nev. R. Prof. Cond. 4.2.

13 While the parties dispute whether Rule 4.2 prohibits what occurred in this case,
14 they generally do not disagree that the following occurred: On the evening of September
15 15, 2020, Mr. Lyons received a phone call from defense counsel. ECF No. 48 at 4; ECF
16 No. 57 at 19. He did not answer. ECF No. 48 at 4; ECF No. 57 at 19. Shortly thereafter, he
17 received a text message from the same number. ECF No. 48 at 4; ECF No. 57 at 19. The
18 text message identified the sender as Mr. Callahan's counsel and asked Mr. Lyons to call
19 her. ECF No. 48 at 4; ECF No. 57 at 19. Mr. Lyons then called defense counsel. ECF No.
20 48 at 4; ECF No. 57 at 19.

21 At some point during the conversation, defense counsel asked Mr. Lyons if he was
22 represented by counsel, and he said no.² ECF No. 48 at 4; ECF No. 57 at 20. Mr. Lyons
23

24 ¹ At the hearing on September 21, 2020, Borgata's counsel raised a separate series of events that
25 Borgata alleges also violated the Nevada Rules of Professional Conduct. Borgata also addressed these
26 events in its supplemental brief. ECF No. 71-1. However, the Court will not address this alleged conduct
27 in the absence of complete briefing on the matter. If Borgata wishes to file another motion related to this
28 alleged conduct, it may do so.

² Mr. Lyons subsequently stated that he thought defense counsel was asking whether he personally
had a lawyer. ECF No. 48 at 4.

1 asked whether he should retain counsel, and defense counsel did not advise Mr. Lyons that
 2 he should contact Borgata's in-house or outside counsel. ECF No. 48 at 4; *see* ECF No. 57
 3 at 20. Defense counsel states that she told Mr. Lyons that it might be smart to retain counsel.
 4 ECF No. 57 at 20.

5 In all events, Mr. Lyons and defense counsel continued speaking. Defense counsel
 6 asked Mr. Lyons to sign a declaration about a statement Borgata's president allegedly made
 7 regarding whether Mr. Callahan could keep his company phone. ECF No. 48 at 4; *see* ECF
 8 No. 57 at 20-21. Ultimately, Mr. Lyons agreed to sign a declaration regarding this
 9 statement and did so. ECF No. 40-2; ECF No. 48 at 4; ECF No. 57 at 21-22.

10 **II. Analysis**

11 Plaintiff argues that defense counsel's contact with Mr. Lyons violated Rule 4.2 of
 12 the Nevada Rules of Professional Conduct and Federal Rule of Civil Procedure 26. ECF
 13 Nos. 48, 49. Defendants disagree and moves to strike certain portions of Plaintiff's
 14 supplemental brief. ECF No. 72.

15 **A. Whether Defense Counsel Violated Rule 4.2**

16 Nevada Rule of Professional Conduct 4.2 provides,

17 In representing a client, a lawyer shall not communicate about the subject of the
 18 representation with a person the lawyer knows to be represented by another
 19 lawyer in the matter, unless the lawyer has the consent of the other lawyer or is
 authorized to do so by law or a court order.

20 Nev. R. Prof. Cond. 4.2. Borgata, as the moving party, "bears the burden of establishing an
 21 ethical violation." *See Rebel Comms., LLC v. Virgin Valley Water Dist.*, No. 2:10-cv-
 22 00513-LRH-GWF, 2011 WL 677308, at *5 (D. Nev. Feb. 15, 2011).

23 Here, the parties' dispute revolves around whether Mr. Lyons was a "person . . .
 24 represented by another lawyer." *See* Nev. R. Prof. Cond. 4.2. Put another way, the parties
 25 disagree about whether Mr. Lyons was a "represented party" such that defense counsel
 26 could not contact him under Rule 4.2.

27 In 2002, the Nevada Supreme Court took up the issue of who, in a corporation, is a
 28 represented person such that Rule 4.2 prohibits lawyers from contacting them. *See Palmer*

1 *v. Pioneer Inn Assocs., Ltd.*, 118 Nev. 943 (2002). Ultimately, the court adopted the
2 “managing-speaking-agent test.” *Id.* at 960. Under the version of the managing-speaking-
3 agent test adopted by the Nevada Supreme Court, “employees should be considered
4 ‘parties’ for the purposes of the disciplinary rule if, under applicable [state] law, they have
5 managing authority sufficient to give them the right to speak for, and bind, the
6 corporation.” *Id.* at 961. The court clarified that “an employee does not ‘speak for’ the
7 organization simply because his or her statement may be admissible as a party-opponent
8 admission. Rather, the inquiry is whether the employee can bind the organization with his
9 or her statement.” *Id.* The court further explained that “[w]hich employees have ‘speaking’
10 authority is determined on a case-by-case basis according to the particular employee’s
11 position and duties and the jurisdiction’s agency and evidence law.” *Id.* at 955.

12 Here, Borgata failed to establish that Mr. Lyons is a managing-speaking-agent.
13 Borgata did not explain in either its opening brief or its supplemental brief how, under
14 applicable state agency or evidence law, Mr. Lyons can speak for and bind Borgata. While
15 Borgata provides facts regarding Mr. Lyons’ high-ranking position, managerial duties, and
16 broad discretion, it does not explain how, *under applicable state agency or evidence law*,
17 Mr. Lyons can bind the company. *See id.* (“Which employees have ‘speaking’ authority is
18 determined on a case-by-case basis according to the particular employee’s position and
19 duties *and the jurisdiction’s agency and evidence law.*”) (emphasis added). In other words,
20 an explanation of Mr. Lyons’s position and duties is a necessary but not sufficient condition
21 for establishing a Rule 4.2 violation. To carry its burden, *Palmer* requires Borgata to
22 provide **both** Lyons’s “position and duties” **and** an analysis of applicable “agency and
23 evidence law.” *See id.*

24 The Court cannot manufacture arguments for parties. *Indep. Towers of Washington*
25 *v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003). And without an explanation of applicable
26 state agency or evidence law, the Court cannot properly apply the managing-speaking-
27 agent test to Mr. Lyons. *See id.* at 956 (“[T]he test relies on a particular jurisdiction’s
28 agency and evidence law.”). As such, the Court cannot find that Mr. Lyons is a managing-

1 speaking-agent of Borgata or that defense counsel violated Rule 4.2 when she contacted
2 him.

3 To be clear, however, the Court is *not* finding that Mr. Lyons is *not* a managing-speaking-
4 agent or that it was proper for defense counsel to contact him.³ Indeed, the Court is troubled by
5 defense counsel contacting Mr. Lyons. He is an executive of an opposing party, and a purely
6 factual analysis of the issue suggests this contact was impermissible. However, the Court is
7 required to not just look at the facts, but also to apply Nevada law. Nevada law requires the Court
8 to analyze whether the employee in question can bind the company under state agency or
9 evidence law. Borgata has not explained how Mr. Lyons can speak for and bind it under state
10 agency or evidence law. Rather, Borgata provided facts demonstrating that Mr. Lyons can
11 obligate the company in certain ways. However, providing facts without an analysis of how the
12 law works is insufficient to carry Borgata's burden. Accordingly, the Court finds that Borgata has
13 not met its burden to explain how, under applicable state agency or evidence law, Mr. Lyons can
14 speak for and bind the company.

15 **B. Whether Defendants Violated Federal Rule of Civil Procedure 26**

16 Borgata also argues that contacting Mr. Lyons violated Federal Rule of Civil
17 Procedure 26 because, by doing so, Defendants engaged in discovery before the parties'
18 Rule 26(f) conference. ECF No. 48 at 10. As a remedy, Borgata asks the Court to deny
19 Defendants' emergency motions (ECF Nos. 32-35). *Id.* at 11.

20 Defendants disagree with Borgata's analysis. ECF No. 57. Defendants argue that
21 they did not engage in formal discovery by contacting Mr. Lyons. *Id.* at 11. Rather,
22 Defendants argue that the discussion with Mr. Lyons was a witness interview and therefore
23 a form of informal investigation not prohibited by Rule 26. *Id.*

24 Rule 26(d)(1) provides, "A party may not seek discovery from any source before
25 the parties have conferred as required by Rule 26(f), except in a proceeding exempted from
26

27 ³ Upon further analysis, this Court agrees with Plaintiff that it was previously reading *Palmer* too
28 narrowly.

1 initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation,
2 or by court order.” The comments to Rule 26(d) provide, “This subdivision is revised to
3 provide that formal discovery—as distinguished from interviews of potential witnesses and
4 other informal discovery—not commence until the parties have met and conferred as
5 required by subdivision (f).”

6 Here, Plaintiff has not established that Defendants violated Rule 26. Plaintiff
7 generally cites to Rule 26 for the proposition that Defendants cannot engage in discovery
8 before the Rule 26(f) conference. ECF No. 48 at 10. However, Plaintiff does not analyze
9 the comment to the Rule, which explicitly seems to permit interviewing potential witnesses
10 before the Rule 26(f) conference. *See id.* Plaintiff also does not cite any case law or other
11 authority for the proposition that Defendants violated Rule 26. *See id.* On this record, and
12 considering the comment to Rule 26, the Court finds that Plaintiff has not established that
13 Defendants violated Rule 26 by interviewing Mr. Lyons.

14 **C. Whether Plaintiff’s Supplemental Brief Should be Stricken**

15 Defendants move to strike certain portions of Plaintiff’s supplemental brief and
16 certain exhibits attached thereto. ECF No. 72. Defendants argue that the Court asked for
17 supplemental briefing on one narrow issue, and Plaintiff’s supplemental brief included
18 arguments and declarations that were outside the scope of the what the Court requested.
19 *See id.* Defendants argue that portions of Plaintiff’s supplemental brief and new
20 declarations were an attempt to “sandbag” Defendants, and the Court should not consider
21 these new arguments or evidence. *See id.* at 4. Alternatively, Defendants argue that if the
22 Court is inclined to consider Plaintiff’s new arguments and evidence, the Court should give
23 Defendants additional time to properly respond. *See id.* at 4-5.

24 Given that the Court is denying Plaintiff’s motions for sanctions, the Court will
25 deny Defendants’ motion to strike as moot.

26 **III. Conclusion**

27 IT IS THEREFORE ORDERED that Plaintiff’s emergency motions (ECF Nos. 48, 49) are
28 DENIED.

1 IT IS FURTHER ORDERED that Defendants' motion to strike (ECF No. 72) is DENIED
2 as moot.

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4 DATED: September 30, 2020

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6 Brenda Weksler
7 UNITED STATES MAGISTRATE JUDGE
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